No. 4445

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHWEST METALS COMPANY,
a Corporation,
Plaintiff in Error,
vs.
FRANCISCO GOMEZ,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF DEFENDANT IN ERROR

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Filed this.....day of....., 1925.
FRANK D. MONCKTON,
Clerk.

By.....
Deputy Clerk.

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STATEMENT OF THE CASE

In filing his brief herein the Defendant in Error does not waive his motion to strike Bill of Exceptions but most respectfully insists thereon.

Our only controversy with the statement of the case as made by the Plaintiff in Error is with that portion of said statement found at page four of the brief of the Plaintiff in Error reading as follows:

> "Defendant offered to prove by the nurse what treatment was given to the Plaintiff, and her observations of the eye, and what *she knew independent* of the physician by reason

of her observations in the capacity of nurse. This the Court refused, and an exception was taken. (See Transcript of Record, page 53)."

If by this statement Plaintiff in Error means to say that the testimony, or evidence offered to be proven by the nurse, was in respect to information secured by her as a nurse independant of her relation to Doctor Franklin, then we say that such is not a true and correct interpretation of the record, but that the true facts are that the testimony and evidence offered by this witness was in respect to information acquired by her while acting as assistant to and agent of Dr. Franklin (See Transcript of Record, page 53).

Before entering upon the argument of the Assignments of Error made by the Plaintiff in Error we desire to point out that no exception was taken by the Plaintiff in Error to the order of the Trial Court denying the motion of plaintiff in Error for a new trial. (Trans. of Rec. p. 81). We therefore, most respectfully contend that all errors which were or could have been urged on the motion for a new trial were waived by the failure of the Plaintiff in Error to except to the ruling of the Trial Court on the motion for a new trial. Having failed to except to the ruling on the motion for a new trial it cannot be reviewed and it follows that any matter which might have been properly urged under the motion is not reviewable. Therefore the only assignment of error properly before this Court is Assignment No. I,

that is as to the sufficiency of the complaint to state a cause of action.

National Surety Co. vs. City of Hobart (Okla.) 162, Pac. 954;

Great Spirit Springs Co., vs. Chicago Lumber Co. (Kan.) 28 Pac. 714;

Turner vs. Franklin, 10 Ariz. 188; 85 Pac. 1070 (and see Spicer vs. Simms, 6 Ariz., 347; 57 Pac. 610);

State ex rel Saunders vs. Clark (Neb.) 82 N. W. 8;

Blonde vs. Merriam (Wyo.) 133 Pac. 1076;

Martin vs. Payne (Colo.) 114 Pac. 486.

ARGUMENT, POINTS AND AUTHORITIES

Assignments of Error I, II, and XI

The first two Assignments of Error are directed to the refusal of the trial court to sustain defendant's demurrer to the complaint, and objection to the introduction of any evidence. The error here urged attacks the sufficiency of the complaint to state a cause of action.

In Calumet and Ariz. M. Co., vs. Chambers, 20 Ariz., 54; 176 Pac. 839, in determining what must be alleged and proved under the Employer's Liability Act of Arizona, the court said:

> "The plaintiff, in order to recover under the employer's liability law, is required to allege

> in his complaint and sustain by evidence that he was employed by the defendant in an occupation declared hazardous, and while engaged in the performance of the duties required of him was injured, and the injury was caused by an accident due to a condition or conditions of such employment, and was not caused by the negligence of the plaintiff."

We do not understand the Plaintiff in Error to contend, nor does it argue, that the complaint herein fails to meet these requirements except that it seems to be contended that no injury is alleged. The contention of Plaintiff in Error is found at page 13 of its brief.

The vacuity of the argument of the Plaintiff in Error renders difficult an attack thereon. The fallacy of the argument is so apparent that the argument itself hardly merits an answer. Plaintiff in Error says at the bottom of page 12 of its brief:

> "This complaint charges that an accident caused a piece of rock to strike the plaintiff in the left eye, thereby injuring said eye "—" "The infection was charged to have resulted from the injury."

And then Plaintiff in Error serenely proceeds to argue that the complaint fails to state a cause of action in that it does not allege that the accident caused the infection. We most respectfully submit that were this conclusion correct, that the

language used in the complaint does not relate the infection to the accident, still the remedy of the Plaintiff in Error with respect to the allegation of infection was by motion to strike as surplusage and not by demurrer, as all the elements of a cause of action under the Employer's Liability Law as stated in the Chambers case supra are present without this allegation. However, it is our opinion that to reach the conclusion argued by the Plaintiff in Error requires a most *ingenuous* closing of the mind to the meaning of simple English words, for it would seem to us that to say that an accident caused an injury which resulted in an infection is about as simple a way as possible to say that the infection was the result of the accident, and we most respectfully direct the Court's attention to the following from Arizona Copper Co., Ltd. vs. Burciaga, 20 Ariz. 85; 177 Pac. 29.

> "Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the *employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss*, are matters of actual loss and as such recoverable.

We deem this sufficient answer to the discussion of Plaintiff in Error on Assignments I and II. The

question of proof though extensively referred to by Plaintiff in Error is of no concern here. The contention of Plaintiff in Error that injuries must be from risks *inherent* in the occupation is answered by Consolidated Ariz. Copper Co. vs. Egich, 22 Ariz. 543, 199 Pac. 132, in which one of the present counsel for Plaintiff in Error appeared for the appellant.

Assignments of Error III and IV

Assignments III and IV are considered together, the identical question being presented in each. However, we submit that Assignment No. III is not properly before the Court because the question asked by counsel was withdrawn before the ruling of the Court. (Trans. of Rec., page 45.) The plaintiff on *cross-examination* testified that Dr. Franklin removed dirt from his eye and that Dr. Vivian had treated both eyes. He had not testified to this on *direct examination.* The defendant then offered the testimony of the doctors which was objected to as privileged. There is no dispute that the relation of physician and patient existed. The question is whether the privilege was waived by the testimony of the plaintiff, Gomez.

We first direct the Court's attention to the provisions of our Statute, Par. 1677, Rev. St. Ariz. 1913.

> "* * * Provided, that if a person offer himself as a witness and *voluntarily* testify * * * that is to be deemed a consent to

the examination of such physician or attorney."

To constitute consent the testimony must be *voluntary.* Testimony given on cross-examination is not voluntary within the meaning of this Statute.

Jones Com. on Evid. Vol. 4, Sec. 761, page 569.

Union Pac. R. Co. vs. Thomas, 152 Fed. 365.

Certainly the Statute would be of little value if the opposing party could by cross-examination lay the foundation for taking away the privilege.

In construing Par. 1677 supra, the Supreme Court of the United States in Railroad Co. vs. Clark, 253 U. S. 669-59 L. Ed. 415, held that the patient in testifying waived the privilege only with respect to what he told the physician, and not as to the knowledge gained by the physician by his examination and the treatment given. This construction of the Statute was followed by the Supreme Court of Arizona in Arizona Copper Co. Ltd. vs. Garcia, 25 Ariz. 158-214 Pac. 317. In the Garcia case, the plaintiff's brother testified on behalf of plaintiff that the physician did in the course of his treatment remove fragments of bone from the plaintiff's leg. The defendant offered to contradict this by the testimony of the physician and the objection based on the claim of privilege was sustained by the Trial Court and the ruling affirmed by the Supreme Court. It is identical with the instant case. And see Inspiration Co. vs. Mindez 19 Ariz. 151, 168; 166 Pac. 278.

Assignment of Error No. V.

Of the sixteen Assignments of Error made by the Plaintiff in Error, this is the only one which even *appears* to savor of merit, and upon analysis it too will be found of no merit whatever. In fact we seriously doubt that *it* can be said to even have the *appearance* of merit.

The question presented is whether the testimony of a nurse who is assisting the physician is privileged within the meaning of Par. 1677, Rev. St. Ariz. 1913, Sec. (6), which provides as follows:

> (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney.

The nurse called by the defendant stated on preliminary examination that she was Dr. Franklin's assistant and assisted in treating the plaintiff. It is undisputed that the relation of physician and patient existed between Dr. Franklin and the plaintiff. Does this privilege extend to the physician's assistant? We note that Plaintiff in Error has used two pages to argue a nurse is not a physi-

cian or surgeon. In that at least Plaintiff in Error is right. A nurse is not physician or surgeon, and we have never so contended. Plaintiff in Error fails to distinguish between a nurse as an independent person, and a nurse acting as the agent or assistant of the physician. The nurse here was asked to testify concerning information secured, not as an independent person, but as the assistant to the doctor. It is the effect of this relation which is here considered. Reported cases are few in which the precise question has been before the Courts. However, we are not without authority of the highest order on the very point at issue. Mr. Wigmore in his great work on Evidence, Second Edition, Vol. 5, paragraph 2381, says:

> "As with the other privileges, however, the privilege forbids compulsory disclosure by that person only to whom the evidence was extended. It, therefore, does not exempt a third person, overhearing the communication, from testifying to it; *except so far* as the third person *is an agent* of the physician." (Italics are ours.)

And in his note to paragraph 2382, Mr. Wigmore says:

> "A nurse as an independent person, receiving medical confidences as such, is not within the privilege; *but a person acting* as the *agent* of a physician *is within the privilege.*" (Italics are ours.)

The following statement is taken from Jones' Com. on Evid. Vol. 4, par. 759 at page 552:

> "On the same principle, the privilege extends as in the case of attorneys, to the communications necessarily made to the physician's assistant."

And see 40 Cyc. 2388, par. d.

In Springer vs. Bryam, 137 Ind. 15; 36 N. E. 361 under a statute very similar to ours, the Supreme Court of the State of Indiana, discussing the privilege in respect to a physician, and pointing out the analogy to the privilege in respect to attorneys, giving a like construction to each, says:

> "Neither can the disclosure be made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other."

And see the following with reference to records kept by attendants:

Stalker vs. Breeze (Ind.) 114 N. E. 968;

Smart vs. Kansas City, 208 Mo. 162; 105 S. W. 709;

Price vs. Standard etc. Co. 90 Minn. 264; 95 N. W. 1118.

In Cahen vs. Continental Ins. Co. 41 N. Y. super. Ct., 296, it was held that the privilege may attach notwithstanding the presence of third persons, including nurses or assistants, in the room.

In North Amer. Union vs. Oleske (Ind.) 116 N. E. 68, it was held that the privilege applied to a person through whom it was necessary for the physician to communicate in order to prescribe for the patient.

In Mutual Life Ins. Co. vs. Owen, 111 Ark. 554; 164 S. W. 720, a physician who was merely a guest of the attending physician accompanied the latter while he examined the patient. He was held within the privilege. So in Renihan vs. Dennin, 103 N. Y. 573, 9 N. E. 320, and in Prader vs. National Masonic Acc. Assoc. 95 Ia. 156; 63 N. W. 601, it was held that the information secured by a consulting physician, called in by the attending physician, is within the privilege. And in Raymond vs. R. R .Co. 65 Ia. 152; 21 N. W. 495 and Aetna Ins. Co. vs. Deming, 24 N. E. 86, the privilege was held to extend to the partner of the attending physician, although he did not treat patient, and the relation of physician and patient did not as a fact exist.

In all these cases, a guest accompanying attending physician, consulting physician called in, partner of attending physician, third person necessary for patient to communicate with physician, the witness sought to be examined did not come within the letter of the law because the true relation of physician and patient did not exist, but the Court in each instance held the testimony to come within the spirit of the law, and allowed the privilege.

It is interesting to note that the Plaintiff in

Error, while citing numerous authorities applying to points not in issue here, has failed to cite one authority even remotely in point on the issue, that is, *does the privilege* apply to a nurse acting as the *assistant* or *agent* of the physician. The only authority cited by appellant approaching the issue is Homnyack vs. Prudential Life Ins. 87 N. E. 769, concerning which Plaintiff in Error says, it:

> "is interesting because it passes upon a statute which expressly includes professional and registered nurses, showing clearly that if the legislature of Arizona had intended to include nurses within the prohibition of the Statute they would have expressly so provided."

Can it be that learned counsel for the Plaintiff in Error have failed to understand that the Indiana Court was there passing on the application of the privilege to *a nurse as an independent person* and *not* a nurse as the *assistant* or *agent* of the physician, and that the Indiana Statute refers to a like situation.

Plaintiff in Error contends that this Statute is in derogation of the common law and should, therefore, be strictly construed. Probably Plaintiff in Error has overlooked Par. 5551, Rev. St. Ariz. 1913: "The rule of the common law that statutes in derogation thereof are to be strictly construed shall not apply to the statutes of this State, but such Statutes and all proceedings under them shall be liberally construed with a view to

effect their objects and to promote justice." But aside from this statute, while it is true that at common law no such privilege extended to communications with physicians as protected communications with attorneys yet the statutes creating the privilege with respect to physician are remedial and are therefore to be *liberally* construed.

> Ariz. and N. M. Ry. Co. vs. Clark 207 Fed 817; Affirmed 253 U. S. 669-59 L. Ed. 415;
>
> Phelps Dodge Corp. vs. Guerrero, 273 Fed. 415;
>
> Manufacturers etc. Co. vs. Brennan, 270 Fed. 173.

And see Gideon vs. St. Charles, 16 Ariz. 435; 146 Pac. 925 where it is held that the court may *enlarge* or restrict words or clauses in order to effectuate the *purpose* of the statute.

> "The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration."
>
> Ariz. & N. M. R. Co. vs. Clark, 253 U. S. 669; 59 L. Ed. 415.

The privilege in respect to physicians was first enacted in New York, most of the other states hav-

ing later adopted like statutes. The purpose in the enactment of all these statutes was to cover the relation of physician and patient with a cloak of confidence, to place it on the same basis as the relation of attorney and client, and thus to allow a greater freedom in the communications by the patient to the physicians in regard to matters touching the disease of the patient.

And see:

Mutual Life Ins. Co. v. Owens, 111 Ark. 554; 164 S. W. 720;

Springer v. Bryan, 137 Ind. 15; 35 N. E. 361;

Smart v. Kansas City, 208 Mo. 162; 105 S. W. 709;

Cahen v. Continental Ins., 41 N. Y. Super. Ct. 296;

North Amer. Union v. Oleske (Ind.), 116 N. E. 68;

Edington v. Ins. Co., 67 N .Y. 185, 194;

Raymond v. R. R. Co., 65 Ia. 152; 21 N. W. 495.

In many, if not by far the greater number, of cases treated by a physician, it is absolutely necessary that the physician have a nurse or assistant to aid him in the treatment or examination. This is especially true where the sickness or ailment is serious. Did the legislature intend that the privilege should not extend to those patients whose ailments were so serious as to require a nurse to as-

sist the physician in treating the patient? For if the privilege does not extend to the agent or assistant of the physician who is present at the treatment, then manifestly a third person being present the privilege is waived as to the physician. It is a matter of common knowledge that a great many physicians, more and more each day, refuse to treat a woman unless a nurse is present. How can the surgeon wield the knife without the operating nurses? Is it reasonable to suppose that the legislature intended that privilege should be denied women who were treated by these physicians, and thus the very purpose of the statute "to encourage full and frank disclosures to the medical adviser by relieving the patient from the fear of embarrassing consequences" be defeated? What of those cases where the physician must act through an interpreter? Surely if effect is to be given to the legislative intent and purpose, the agents and assistants of the physician in treating the patient must be held within the privilege. To hold otherwise would be to nullify the purpose of the statute. Paraphrasing the words of Mr. Justice Pitney in Arizona N. & M. R. Co. v. Clark supra: *to construe that act in accordance with the contention of Plaintiff in Error would render it inapplicable in all cases where the physician requires the aid of an agent or assistant in treating the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where a nurse or as-*

sistant is not necessary to aid the physician in treating the patient. As the United States Supreme Court said in the Clark case, we believe this Court will say: "We are constrained to reject this construction."

Assignment of Error No. VI.

Dr. Robert C. Buck was appointed by the Court to examine the plaintiff under the provision of Chapter 30, Session Laws of Arizona, 1923. He testified that he was not employed by either the plaintiff or defendant. It is here claimed that the trial court erred in sustaining the objection of the Defendant in Error to the offer of the Plaintiff in Error to prove that Dr. Robert Buck was appointed by the court under Chapter 30, Session Laws of Arizona, 1923, page 102. This assignment is not well taken for the reason that it does not appear by the Bill of Exceptions that Dr. Buck was asked such a question; nor that, if it was, an objection was made and sustained to the question and an exception noted. In other words, there is nothing in the record upon which to base this Assignment of Error.

As to the merits, Plaintiff in Error says: "Under the familiar rule of evidence, that interest or lack of interest, or the bias or prejudice of the witness may be shown, we feel that the trial court erred". (Brief, page 28.) If there is a "familiar rule of evidence" that lack of interest or bias may be

shown when the credibility of the witness *has not been attacked* we have failed to discover it in the works of the numerous authors on evidence. The true rule is that a witness is presumed to speak the truth, and evidence *cannot* be introduced to sustain the credibility of a witness *who has not been impeached.*

40 Cyc. 2555 and cases cited, notes 42-43;

Central Vt. Ry. Co. v. Cauble, 228 Fed. 876;

Hanks v. Yellow Cab & Bag. Co. (Kan.), 209 Pac. 977;

Ellis v. Central Cal. Tract. Co. (Colo.), 174 Pac. 407.

Here the credibility of the witness, Dr. Buck, was never attacked, and evidence was inadmissible to show his credibility, and we most earnestly contend it would be giving undue weight to his testimony to have permitted the question if asked.

Assignment of Error No. VII.

Error is here assigned to the trial court sustaining the objection of the Defendant in Error to the question asked Dr. Bakes testifying as a witness for Defendant in Error:

> "You make it a habit of appearing for the plaintiff in these personal cases?"

the offer being made, as stated by counsel, for the purpose of showing interest. Interest as used with reference to the credibility of witnesses means a

personal interest in the subject matter or result of the action. The fact that the witness has testified for the plaintiffs in any number of like cases can in no way show that he has an interest in the result of the particular action. Nor is it evidence of bias or prejudice in this particular case. He testified he was employed by this plaintiff. The fact that he had been employed by other plaintiffs against other defendants could be no evidence that he was biased or prejudiced as to the parties to this action.

C. & E. I. R. Co. v. Schmitz, 211 Ill. 446; 71 N. E. 1050;

Chicago City Ry. Co. v. Smith, 226 Ill. 178; 80 N. E. 716;

St. L. I. M. & S. R. Co. v. McMichael (Ark.), 171 S. W. 115.

Assignment of Error No. VIII.

Plaintiff in Error assigns as error the order of the trial court in permitting the plaintiff, over the objection of defendant, to offer in evidence the testimony of Dr. Bakes as to plaintiff suffering with "industrial blindness". The contention of the plaintiff in error seems to be that the complaint alleges total and permanent disability, and therefore evidence of anything less than absolute blindness is inadmissible. We are at a loss to understand what the argument, if such it may be called, of Plaintiff in Error is on this assignment. Reference is made to the pleadings and to Sections 3154 and 3158,

Civil Code of Arizona, but without attempting to show the application thereof. Possibly, plaintiff in error was as unable as we to see the application. The damages recoverable under the Arizona Employers' Liability Law are, such as will compensate for the loss caused by the accident and injury. Ariz. Copper Co. v. Burciaga, 20 Ariz. 85; 177 Pac. 29. *Impairment* of earning capacity may be shown under an averment of permanent disability.

17 C. J. 1016, par. 313;

Terre Haute Elec. Co. v. Watson, 33 Ind. A. 124; 70 N. E. 993;

Bayles vs. Savery Hotel Co., 148 Ia. 29; 126 N. W. 808;

Tex. Etc. R. Co. v. Elliot (Tex.), 189 S. W. 737;

Shimmin v. Mining Co. (Mo.), 187 S. W. 76.

Assignments of Error Nos. IX and X.

Plaintiff in Error had offered the testimony of Doctor Buck and Mr. Culp as to the present condition of the left eye of Defendant in Error, and the cause thereof. Each had qualified as experts and testified as to his opinion regarding the condition of the eye. Plaintiff in Error then called Dr. Vivian and Dr. Gotterdam, each of whom stated he had heard the testimony of Dr. Buck and Mr. Culp. Each was asked, assuming the facts as testified to

by Dr. Buck and Mr. Culp to be true, what, in his opinion, was the present condition of plaintiff's eye and cause thereof. It is true that in some jurisdiction to economize time, experts may be examined "on the evidence", but even in those jurisdictions it is discretionary with the trial court, it being recognized that reason is against such a rule.

22 C. J. 717.

But by the weight of authority and in the Federal Courts this practice is condemned and disallowed. Mfrs. Acc. Ind. Co. v. Dorgan, 58 Fed. 945, by Judge Taft:

> "The question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based."

And see 22 C. J. 718, par. 807.

There is absolutely no authority which will permit an expert to express an opinion based on evidence which includes the *opinion of other experts*, as here.

2 Jones Com. Evid. 916;
22 C. J. 718;
11 R. C. L. 582;
18 A. L. R. 106;
8 A. L. R. 1316;
29 L. R. A. (N. S.) 537.

Assignments of Error Nos. XI, XII, XIII, XIV, XV and XVI.

The only question raised under these assignments is as to the sufficiency of the evidence to support the verdict. Naturally, we feel that the jury should have given the Defendant in Error a larger verdict and do not argue with Plaintiff in Error as to that. And we say that the contention of Plaintiff in Error that there is no evidence to support this verdict is ridiculous and frivolous in the extreme. The testimony of the plaintiff, Gomez, and the witness, Francisco Lopez, is uncontradicted that on the 13th day of June, 1923, the plaintiff was employed by the defendant as a miner in defendant's mine; that while picking rock in said mine a piece of rock struck plaintiff's eye. This evidence is undisputed. (Trans. of Rec. p. 36, 42). But plaintiff in Error says there is no evidence of damage. Defendant in Error, Gomez, testified that there was nothing wrong with his eyes before he was hurt on June 13, 1923. That he could see perfectly before then. That the rock struck him in the center of the left eye, and that it caused him pain and interfered

with his vision. That now his eye is cloudy and he cannot see out of it, and has been that way since the accident of June 13, 1923. (Trans. of Rec. p. 37.) Dr. Bakes testified that he examined the plaintiff on July 23, 1923, and found a corneal scar on the center of the cornea of the left eye almost completely filling the pupilary area. The scar was on the outside surface of the cornea. His condition was an ulcerative ceratatis, and syphilis had absolutely nothing to do with it. (Defendant contended eye condition was caused by syphilis.) (Trans. of Rec. pages 54 and 57.) That is our answer to the challenge of Plaintiff in Error that we point out any condition to sustain the verdict. If more is asked, we point to Plaintiff's Exhibit No. 1 (Trans. of Rec., page 20), the hospital card from defendant's hospital on which Dr. Franklin states plaintiff has a cornea ulcer; not interstitial ceratatis or syphilitic infection, as defendant contended.

A Federal Court of error cannot set aside the verdict of a jury in an action at common law as against the weight of the evidence, when there was any evidence in support thereof.

Foster Fed. Prac., Vol. 4, page 3884;

Wilson v. Everett, 139 U. S. 616; 35 L. Ed. 286;

R. R. Co. v. Winter's Adm. 143 U. S. 60; 36 L. Ed. 71;

Hamilton Inv. Co. Bollman, 268 Fed. 788;

Same case, 255 U. S. 571; 65 L. Ed. 791.

In conclusion we respectfully submit that the assignments of error, and each of them, are without merit, and the judgment and order appealed from should be affirmed.

Respectfully submitted,

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